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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

9 PAUL CARNEY,

10 Plaintiff,

11 v.

12 C. WARNER, *et al.*,

13 Defendants.

No. C08-5653 BHS/KLS

ORDER RE-NOTING MOTION TO
DISMISS AS MOTION FOR SUMMARY
JUDGMENT

14 Presently before the Court is the motion of Defendant Cindy Warner to dismiss all of
15 Plaintiff Paul Carney's claims against her. Dkt. 30. Defendant Warner argues that Plaintiff's
16 claims must be dismissed because they are time barred and because he has failed to state a claim.

17 *Id.* In support of her motion, Ms. Warner relies on her declaration, with attached exhibits
18 relating to Mr. Carney's participation in a chemical dependency program, and the declaration of
19 Kiera Silva with attached exhibits, including Mr. Carney's medical records. Dkts. 31 and 32.

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21 "When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers evidence
22 outside the pleadings, it must normally convert the 12(b)(6) motion into a Rule 56 motion for
23 summary judgment, and must give the nonmoving party an opportunity to respond." *United*
24 *States v. Ritchie*, F.3d 903, 907 (9th Cir.2003) (citations omitted). However, the court may
25 consider certain materials without converting the motion to dismiss into a motion for summary
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1 judgment. *Id.* at 908 (citing *Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir.2000); *Barron v.*
2 *Reich*, 13 F.3d 1370, 1377 (9th Cir.1994)). Such materials include documents attached to the
3 complaint, documents incorporated by reference in the complaint, or matters of judicial notice.
4 *Id.*

5 Courts may take judicial notice of adjudicative facts that are “not subject to reasonable
6 dispute.” Fed.R.Evid. 201(b). A fact is not subject to reasonable dispute, and is thus subject to
7 judicial notice, only where the fact is either “(1) generally known within the territorial
8 jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to
9 sources whose accuracy cannot reasonably be questioned.” Fed.R.Evid. 201(b). If matters of
10 public record meet the requirements of Rule 201(b), then the court may consider the documents
11 without converting the motion to dismiss into a motion for summary judgment. *Ritchie*, 342
12 F.3d at 909.

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15 Where “matters outside the pleading are presented to and not excluded by the court,” a
16 rule 12(b)(6) motion is “treated as one for summary judgment and disposed of as provided in
17 Rule 56,” while allowing all parties a “reasonable opportunity to present all material made
18 pertinent to such a motion by Rule 56.” Fed.R.Civ.P. 12(b). In transforming a dismissal into a
19 summary judgment proceeding, the court must inform a plaintiff proceeding *pro se* that it is
20 considering more than the pleadings and afford the opportunity to present all pertinent material.
21 *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996); *Lucas v. Department of Corr.*, 66 F.3d
22 245, 248 (9th Cir. 1995). “If the pro se litigant is a prisoner, the district court’s duties are even
23 greater: ‘The district court is obligated to advise prisoner pro se litigants of Rule 56
24 requirements.’” *Anderson*, 86 F.3d at 935 (quoting *Klinge v. Eikenberry*, 849 F.2d 409, 411-12
25 (9th Cir. 1988)).
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1 In this case, the court finds appropriate the conversion of Defendant's motion to dismiss
2 to a Rule 56 motion for summary judgment. In so doing, the court advises Plaintiff of the
3 following:

4 A motion for summary judgment under Rule 56 of the Federal Rules
5 of Civil Procedure will, if granted, end your case [as to the claims and defendants
6 addressed in the motion].

7 Rule 56 tells you what you must do in order to oppose a motion for summary
8 judgment. Generally, summary judgment must be granted when there is no
9 genuine issue of material fact -- that is, if there is no real dispute about any fact
10 that would affect the result of your case, the party who asked for summary
11 judgment is entitled to judgment as a matter of law, which will end your case.
12 When a party you are suing makes a motion for summary judgment that is
13 properly supported by declarations (or other sworn testimony), you cannot simply
14 rely on what your complaint says. Instead, you must set out specific facts in
15 declarations, deposition, answers to interrogatories, or authenticated documents,
16 as provided in Rule 56(e), that contradict the facts shown in the defendant's
17 declarations and documents and show that there is a genuine issue of material fact
18 for trial. If you do not submit your own evidence in opposition, summary
19 judgment, if appropriate, may be entered against you. If summary judgment is
20 granted, your case will be dismissed and there will be no trial.

21 *Rand v. Rowland*, 154 F.3d 952, 962-963 (9th Cir. 1998)(emphasis added).

22 Furthermore, Local Rule CR 7(b)(4) states that a party's failure to file necessary
23 documents in opposition to a motion for summary judgment may be deemed by
24 the court to be an admission that the opposite one is without merit.

25 In converting this motion, the court stresses that both plaintiff and defendants should take
26 the opportunity to present all arguments and material pertinent to a Rule 56 motion. Thus, the
court hereby requests additional briefing from the parties.

Accordingly, it is **ORDERED**:

(1) Defendant Warner's motion to dismiss (Dkt. 30) is converted to a motion for
summary judgment and shall be **re-noted** on the court's calendar for **January 8, 2010**.

1 (2) Defendants may submit any additional briefing and supportive material on or
2 before **December 11, 2009**.

3 (3) Plaintiff shall respond **on or before January 4, 2010**.

4 (4) Defendants may submit a reply on or before **January 8, 2010**.

5 (5) The Clerk of the Court is directed to send copies of this Order to counsel of record
6 and to Plaintiff.
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8 DATED this 23rd day of November, 2009.

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11 Karen L. Strombom
12 United States Magistrate Judge
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